# STATE OF MICHIGAN

# COURT OF APPEALS

KEVIN L. SCHEMBER,

Plaintiff-Appellee,

v

KRISTI L. RUTH,

Defendant-Appellant.

UNPUBLISHED
July 7, 2005

No. 259630
Huron Circuit Court
LC No. 01-001642-DP

Before: Sawyer, P.J., and Markey and Murray, JJ.

PER CURIAM.

Defendant appeals as of right from an order of the circuit court granting plaintiff joint physical and legal custody of the parties' minor daughter. We reverse and remand.

Defendant was going through a divorce when she began dating plaintiff. As a result of the relationship, defendant became pregnant with plaintiff's child. The relationship did not last long, and the parties terminated their relationship after one month of cohabitation. The parties' minor daughter was born August, 27, 2001. Since birth, the parties' daughter resided with defendant except for the occasions when plaintiff had parenting time. In May 2002, the trial court entered an order granting plaintiff supervised parenting time. In October 2002, the court entered an order granting plaintiff graduated parenting time, beginning with a period of supervised visitation and concluded with plaintiff having reasonable standard parenting time. On December 27, 2002, the trial court entered a temporary order granting defendant sole physical custody of the parties' minor daughter. Plaintiff's parenting time schedule remained unaffected. On May 17, 2003, the trial court entered an order granting physical custody to defendant with the issue of joint legal custody held in abeyance. Again, plaintiff's parenting time schedule remained unaffected. Finally, on November 1, 2004, the trial court held an evidentiary hearing and in an oral opinion granted the parties shared legal and physical custody of their daughter.

Defendant claims that the trial court committed legal error in awarding shared physical and legal custody. Custody disputes are to be resolved in the child's best interest, as measured by the factors set forth in MCL 722.23. All custody orders must be affirmed on appeal unless the trial court's findings were against the great weight of the evidence, the court abused its discretion, or the court made a clear legal error on a major issue. MCL 722.28; *Harvey v Harvey*, 257 Mich App 278, 283; 668 NW2d 187 (2003). Under the great weight of the evidence standard, a trial court's findings should be affirmed unless the evidence clearly preponderates in the opposite direction. *Fletcher v Fletcher*, 447 Mich 871, 879 (Brickley, J.), 900 (Griffin, J.);

526 NW2d 889 (1994); *Ireland v Smith*, 214 Mich App 235, 242; 542 NW2d 344 (1995). In reviewing the findings, we defer to the trial court's determination of credibility. *Mogle v Scriver*, 241 Mich App 192, 201; 614 NW2d 696 (2000). The abuse of discretion standard applies to the trial court's discretionary rulings, including the ultimate disposition of the issue of custody. *Fletcher, supra* at 879-880 (Brickley, J.), 900 (Griffin, J); *Fletcher v Fletcher*, 229 Mich App 19, 24; 581 NW2d 11 (1998).

Defendant first argues that the trial court clearly erred when it failed to make a factual determination of whether there was an established custodial environment. We agree. An established custodial environment exists if "over an appreciable time the child looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort," MCL 722.27(1)(c), and is marked by qualities of security, stability, and permanence, *Mogle, supra* at 197. Where the trial court finds no established custodial environment, the court may change custody if the moving party proves by a preponderance of the evidence that the change is in the child's best interest. *LaFleche v Ybarra*, 242 Mich App 692, 696; 619 NW2d 738 (2000). Once a custodial environment is established, however, the moving party "must show by clear and convincing evidence that it is in the child's best interest" to change custody. *Phillip v Jordan*, 241 Mich App 17, 25; 614 NW2d 813 (2000). Whether an established custodial environment exists is a question of fact. *Foskett v Foskett*, 247 Mich App 1, 6; 634 NW2d 363 (2001).

In its oral opinion, the trial court made the following observation about the existence of an established custodial environment: "I don't think there is an established custodial environment *as a matter of law*, and that's a legal issue, and I think that that was reserved from day one in this case and there's never been a judicial ruling on whether one party or the other has legal custody." (Emphasis added.) The court's treatment of this issue as a legal one is a clear misapplication of established law. Trial courts are required to make a factual inquiry regarding the existence of an established custodial environment. *Jack v Jack*, 239 Mich App 668, 670; 610 NW2d 231 (2000). It is clear from the court's holding that no such inquiry was made in this case. While the December 27, 2002, temporary custody order specified that there would be no presumed custodial environment during the pendency of that order, this Court has previously stated that a court's custody order is not relevant to the analysis of whether an established custodial environment exists in fact. *Hayes v Hayes*, 209 Mich App 385, 388; 532 NW2d 190 (1995). Rather, the inquiry is factual in nature and requires the court to carefully review the facts surrounding the care of the child to determine who the child looks to for guidance, discipline, the necessities of life, and parental comfort. MCL 722.27(1)(c). Therefore, the trial court should have decided whether, based on the statutory criteria, there was an established custodial environment from the daughter's birth to the present.

Where the trial court fails to make the required factual finding, this Court can make its own determination of whether an established custodial environment exists if there is sufficient information in the record. *Jack, supra* at 670. On reviewing the record, we conclude that an established custodial environment had been established with defendant prior to trial. Since birth, the minor child has lived with defendant. Moreover, she lived with defendant for over one year before the stipulation of no established custodial environment and continued to live with her for almost two additional years after the January 30, 2003, hearing. Over her lifetime, she has looked to defendant for guidance, discipline, the necessities of life, and parental comfort.

Defendant also argues that the trial court clearly erred in failing to explicitly state its findings and conclusions regarding each of the best interest of the child factors. Again, we agree. While the trial court need not comment on "every matter in evidence or declare acceptance or rejection of every proposition argued," *Baker v Baker*, 411 Mich 567, 583; 309 NW2d 532 (1981), a trial court's failure to state findings and conclusions regarding each factor is error requiring reversal, *Daniels v Daniels*, 165 Mich App 726, 730; 418 NW2d 924 (1988). It is difficult for this Court to engage in a meaningful review without knowing what evidence the trial court relied on for its determination. Except for factor (b), the trial court did not specifically address any of the other factors.[1]

Therefore, having concluded that there is an established custodial environment with defendant, we remand this case for the trial court to determine whether, in light of the clear and convincing evidence standard, a change in custody is in the best interest of the child. In making this determination, the trial court shall consider up-to-date information and state its findings with respect to each of the statutory best interest factors. *Bowers v Bowers*, 190 Mich App 51, 55; 475 NW2d 394 (1991).

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ Jane E. Markey
/s/ Christopher M. Murray

[1] In its oral opinion the trial court stated, "I went through all of the factors in the child custody act and evaluated each of those, and I don't think it is necessary for me . . . to indicate which party . . . is favored on any particular factor." Because the trial court did not explicitly state its findings and conclusions regarding each factor, this Court cannot address the mother's argument that the trial court's findings were against the great weight of the evidence.